Supreme Court, U.S.
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No. 09-1035

In The
Supreme Court of the United States

IMAD SALIM HEREIMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Petitioner was convicted of aiding and abetting a violation of *18 U.S.C. § 1341* under a failure to disclose theory, after he was denied the use of evidence that would have shown he was a victim of deception on the part of Nezar Khaled "Mike" Maad. A conviction for aiding and abetting a violation of *18 U.S.C. § 1341*, under a failure to disclose theory, required proof that petitioner had knowledge of Maad's duty and failure to disclose. The deliberate ignorance instruction given to the jury allowed the jury to find knowledge based on a "high probability" that facts supporting the knowledge element of the offense were true. Denying the right to admit evidence supporting an affirmative defense and allowing the jury to decide important facts going toward establishing an element of the offense based on a substantial or high probability that the fact is true both raise serious constitutional questions.

I. The Government likely misunderstood the questions presented in the Petition.

The Government either attempts to recharacterize or it misunderstood the questions presented by Petitioner. (GB 6). Petitioner does not argue that the district court "abused its discretion" when it instructed the jury about deliberate ignorance and when it denied Petitioner's request to introduce evidence supporting his affirmative defense. *Id.* Nor does Petitioner argue that the district court erred in

giving the deliberate ignorance instruction solely because it did not include a motive element. (GB 6). Petitioner argues that the deliberate ignorance instruction lessened the burden of proof and denies Petitioner his constitutional right to be convicted by proof beyond a reasonable doubt. (Pet. 13-22). Regarding admission of evidence, Petitioner argues that precluding the admission of Rule 404(b) evidence, that is relevant to an affirmative defense, implicates the due process rights of a criminal defendant because he is denied the right to a complete defense. (Pet. 22).

II. The deliberate ignorance instruction unconstitutionally allows the jury to find facts relevant to the intent or knowledge element of an offense by "substantial probability" instead of proof beyond a reasonable doubt.

Petitioner objected to the deliberate ignorance instruction, in part, because it lessened the burden of proof required for a conviction. (Pet. App. 49-53; 54-64). In his argument before the Court of Appeals, Petitioner clearly argued that the deliberate ignorance instruction allowed the jury to convict under the wrong standard by finding facts based on a substantial probability that the fact was true rather than on proof beyond a reasonable doubt. (Ninth Circuit, Brief of Appellant at 22-25 and Reply Brief at 8-10). "Substantial probability," as a burden of proof, lies somewhere between preponderance of the evidence

and clear and convincing evidence. Substantial probability has been defined as "much more likely than not." *State v. Nelson (In re Nelson)*, 727 N.W.2d 364, 367 (Wis. Ct. App. 2006).[1]

This Court has held, the Fifth and Sixth Amendments to the U.S. Constitution require criminal convictions to rest upon a jury determination that the defendant is guilty, beyond a reasonable doubt, of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993). The prosecution bears the burden of proving all elements of the offense charged, *see, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977); and the prosecution must persuade the fact finder of the facts necessary to establish each of those elements, *see, e.g., In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam). Each fact must be proven "beyond a reasonable doubt." *Id.*

Synthesizing this Court's prior decisions, it is clear that every fact supporting a conviction must be proven beyond a reasonable doubt and it would violate the constitutional principles laid down by this Court to allow an important element of an offense to be established based on a substantial/high probability

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[1] Petitioner has not waived this argument. (GB 7). Petitioner clearly presented this argument to district court (Pet. App. 54-64); and the Court of Appeals (Ninth Circuit Docket No. 10). The Court of Appeals was bound by its prior decisions and it failed to even address the question whether the instruction in this case lessened the burden of proof. (Pet. App. 1-3).

that necessary facts are true. (Pet. App. 52-53). In the instant case, Instruction No. 6, which the district court intended as an alternative to Instruction No. 3 (Pet. App. 56); allowed the jury to determine Petitioner's knowledge, not based on actual knowledge that Mike Maad had a duty to disclose and in fact failed to disclose a conflict of interest; but based on the fact that Petitioner was aware of a "high probability" that Mike Maad had failed to disclose his conflict of interest to his employer. (Pet. App. 52-53).

Instruction No. 3 told the jury that in order to convict Petitioner of aiding and abetting honest services fraud, the jury had to conclude that Mike Maad had a legal duty to disclose his involvement with Petitioner's business interests and that Mike Maad failed to disclose that involvement. (Pet. App. 50). Instruction No. 3 further informed the jury it had to find "beyond a reasonable doubt" that Mike Maad committed honest services fraud by mail and that Petitioner knowingly and intentionally aided and counseled Mike Maad to commit the crime of honest services fraud by mail. (Pet. App. 52).

While Instruction No. 3 may have adequately stated the burden of proof, the alternative instruction, Instruction No. 6, allowed the jury to determine knowledge and intent based on a "high probability" that Mike Maad had committed honest services fraud by mail, that Petitioner was aware of this "high probability," and that Petitioner deliberately avoided learning the truth. *Id.* The alternative Instruction allowed Petitioner to be convicted of aiding and

abetting a crime even if Mike Maad was not guilty of a crime. *Id.* Instruction No. 6 clearly changed the burden of proof and the elements of the crime. *Id.* Instruction No. 3 required the jury find beyond a reasonable doubt that Mike Maad committed a crime and Petitioner knowingly and intentionally aided and abetted in the commission of that crime. Instruction No. 6 allowed the jury to convict the Petitioner if there was merely a "high probability" that Mike Maad was guilty of a crime and there was a high probability that Petitioner was aware of Mike Maad's failure to disclose. (Pet. App. 52-53).

The Fifth Amendment Due Process Rights and Sixth Amendment guarantees of notice and jury trial indisputably entitle a criminal defendant to: "A Jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

A significant and important question is raised in this case warranting discretionary review by this Court: whether the deliberate ignorance instruction, as an alternative to the knowledge and crime occurrence elements of the offense of aiding and abetting, violates Petitioner's right to be convicted by proof beyond a reasonable doubt. (Pet. 13-16). The fact that

most jurisdictions have some version of the deliberate ignorance instruction and that deliberate ignorance instructions are used in a variety of crimes, shows that the question presented is an important one because it would be reasonable to suspect that hundreds of convictions are entered based on the wrong standard of proof. *See, e.g., United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (deliberate ignorance instruction used in prosecution for drug offenses).

In one of the first cases authorizing a deliberate ignorance instruction, the instruction required proof beyond a reasonable doubt that the defendant was deliberately ignorant. *See Spurr v. United States*, 174 U.S. 728, 738 (1899). After this Court's decision in *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969), which discussed the definition of knowledge but did not specifically approve of a deliberate ignorance instruction, the Court of Appeals for the Ninth Circuit entered its decision in *United States v. Jewell*, 532 F.2d 697, 703 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). Over the next thirty-five years, the instruction has been transformed through judicial decision into instructions that allow negligence to be substituted for proof beyond a reasonable doubt.

Clearly, the prosecution must show knowledge of the material elements of the offense, rather than mere recognition of some wrongdoing. *See, e.g.*, *United States v. Morales*, 577 F.2d 769, 773 (2d Cir. 1978) (stating that, to convict for knowing importation, "the Government had to show that appellant knew she possessed drugs, not that she was aware

that she might be involved in some sort of criminal activity"); *see also United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325-1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part) (stating that, in deliberate-ignorance cases, "the evidence [must] sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged"). The deliberate ignorance instruction, if allowed at all, should not be allowed unless the evidence can sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged. *Id.* The danger in allowing instructions, like the one at issue in the instant case, is that juries will avoid questions of scienter and convict under the standards analogous to negligence. *Id.* Such convictions are wholly inconsistent with the requirement that an individual be convicted by proof beyond a reasonable doubt. *See id.*, 552 F.2d at 1325-1326 (Kennedy, J., concurring in part and dissenting in part). Important constitutional issues are presented in the Petition and the question clearly has national implications.

III. There is a significant question whether Evidence Rule 404(b) should be strictly applied to prevent evidence supporting an affirmative defense in a criminal proceeding.

In presenting its evidence at trial, the Government opened the door to the admission of Rule 404(b) evidence by admitting testimony concerning Mike Maad's criminal history and his prior conduct. (Tr. Vol. III at 105). This evidence centered on Maad, his prior bad acts, and the reason that he was on Federal Probation for prior crimes. (Tr. Vol. III 105-126). When Petitioner sought to introduce additional evidence of Mike Maad's prior conduct, that was relevant to Petitioner's defense that he had been duped, the district court clearly stated the proffered evidence tended to prove propensity, which is precluded by 404(b). (App. 46-47).

There is clearly a conflict between the Circuit Courts of Appeals regarding the application of Rule 404(b) preclusive effect when a criminal defendant seeks to admit evidence tending to prove a defense. (Pet. 17-21). The question whether Rule 404(b) should preclude the admission of bad acts evidence that is relevant to a defense is a question of constitutional import. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

The question is whether exclusion of evidence because it tends to show propensity is reasonable when the defense seeks to admit the evidence and

there is no prejudice to the prosecution. *See United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005) (finding a Confrontation Clause violation when defendant, who argued that he did not know the truck in which he was riding was filled with marijuana, was not permitted to cross-examine the owner of the truck about a previous incident involving marijuana hidden in a truck), *United States v. Aboumoussallem*, 726 F.2d 906, 911-913 (2d Cir. 1984) (finding reverse 404(b) evidence that third party may have been "duped" by coconspirator into transporting narcotics unknowingly was relevant to show that the defendant was also duped into transporting narcotics unknowingly), and *United States v. McClure*, 546 F.2d 670, 672-673 (5th Cir. 1977) (finding that "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced").

Contrary to the Government's position (GB 11-13), there is a conflict between the Circuits as to the standard to be applied when the defense seeks to introduce Rule 404(b) evidence and the district court did exclude the evidence because it tended to show propensity. (Pet. App. 39-40). Because Mike Maad had fled the country and was not available to testify and had not previously testified, Petitioner should have been allowed to proffer Rule 404(b) evidence to support his defense. The question is, should there be a different standard applied when the defense seeks to

introduce Rule 404(b) evidence and there is no prejudice to the prosecution.

CONCLUSION

Petitioner agrees that he may be entitled to relief from his conviction depending upon the Court's decisions in *Skilling v. United States*, No. 08-1394 and *Weyhrauch v. United States*, No. 08-1196 and should the Court decide not to grant his petition on the questions presented, his case should be held in abeyance until those cases are decided. *Skilling* challenges *18 U.S.C. § 1346* as being void for vagueness and that issue is also raised in *Weyhrauch*. If the statute is void as to *Skilling* and *Weyhrauch* it would be void as to Petitioner. However, Petitioner prays for an order granting his petition because there are questions raised in Petitioner's case that are of national import and which are not raised in *Skilling* or *Weyhrauch* and which are far reaching in that the questions presented apply to prosecutions for offenses other than honest services fraud.

Respectfully submitted,

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